In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1155

UNITED STATES OF AMERICA, APPELLANT

v.

MILAN VUITCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Court has requested counsel to consider the question whether, under the Criminal Appeals Act, 18 U.S.C. 3731, this Court has jurisdiction to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment because of the invalidity of the statute on which the indictment was founded where the underlying statute is applicable only to the District of Columbia. We answer in the affirmative, on the basis of decisions of this Court and of the Court of Appeals for the District of Columbia Circuit.

382-201—70

Section 3731 provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
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> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity of the statute upon which the indictment or information is founded.
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> * * * * *
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> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

1. Until 1907, the United States had no right of appeal in criminal cases tried in federal courts outside of the District of Columbia. See *United States* v. *Sanges*, 144 U.S. 310. To remedy this situation, a bill was introduced in the House of Representatives in 1906 adopting the language of § 935 of the District of Columbia Code of 1901, which had given the government "the same right of appeal that is given to the defendant." See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess. The proposed legislation was designed to extend the "provision of the code of the District of Columbia to all districts in the United States," H. Rep.

No. 2119, 59th Cong., 1st Sess. 2. The final Criminal Appeals Act which emerged as law in 1907 rejected the District provision in favor of language restricting the government's right of appeal to narrowly defined instances and providing for a direct appeal to this Court from decisions of "district or circuit courts."[1]

In 1933, this Court held that the term "district court", as used in the Criminal Appeals Act, did not encompass the Supreme Court of the District of Columbia (the trial court of the District), notwithstanding a section in the District of Columbia Code providing that the Supreme Court of the District "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States." *United States* v. *Burroughs*, 289 U.S. 159, 163. When the Criminal Appeals Act was amended in 1942 to provide for appeals to the circuit courts of appeals, specific reference was made to, and the same jurisdiction conferred upon, the "United States Court of Appeals for the District of Columbia." 56 Stat. 271. In the same statute, Congress included a separate provision giving the United States Court of Appeals for the District of Columbia power to review judgments of the (by then created) District Court of the United States for the District of Columbia in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law." 56 Stat. 272.[2]

[1] For a discussion of the legislative history of the Criminal Appeals Act, see *United States* v. *Carroll*, 354 U.S. 394, 402, fn. 11.

[2] Specific reference in the Criminal Appeals Act to the United States Court of Appeals for the District of Columbia was elim-

The legislative history of the 1942 amendment casts no light upon—indeed includes no discussion of—this aspect of the law which for the first time brought the United States District Court and Court of Appeals within the Criminal Appeals Act. Similarly there is no mention of any *limitation* on the jurisdiction conferred upon this Court when the appeal is from the dismissal of an indictment based upon the invalidity or construction of a local District of Columbia statute. On the contrary, it seems to have been assumed that the United States courts for the District of Columbia were not distinguishable from the other United States district and appellate courts insofar as appeals by the United States in criminal cases are concerned. See H. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess. Indeed, it is now well settled that, since the 1942 amendments, the Criminal Appeals Act applies to decisions of the United States District Court of the District of Columbia. *United States* v. *Hoffman,* 161 F. 2d 881, 882–883 (C.A.D.C.), jurisdiction upheld on certification to this Court but judgment reversed on other grounds, 335 U.S. 77. See also *Carroll* v. *United States,* 354 U.S. 394, 411; *United States* v. *Bramblett,* 348 U.S. 503; *United States* v. *Waters,* 175 F. 2d 340 (C.A.D.C.).

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inated by an amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the courts (*i.e.*, "courts of appeals" for "circuit courts." 62 Stat. 991; see also 63 Stat. 107, now 28 U.S.C. 451).

In *Carroll* v. *United States* this Court discussed at length the relationship between the Criminal Appeals Act and § 23–105 of the D.C. Code (the successor to § 935, cited above) and concluded that—

> appeals by the Government in the District in Columbia are not limited to the categories set forth in 18 U.S.C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [§ 23–105] * * *. 354 U.S. at 411.

In cases not covered by § 3731, the limits of the government's right to appeal in the District of Columbia would be defined by the general criminal appeals statute, 28 U.S.C. 1291.

2. The question therefore is whether a judgment holding unconstitutional a statute applicable only to the District of Columbia is a "decision * * * based upon the invalidity of the statute upon which the indictment * * * is founded" within the purview of 18 U.S.C. 3731, in which case a direct appeal to this Court is proper. If, on the other hand, statutes applicable only to the District of Columbia do not fall within the quoted language, the appropriate appeal in this case is to the Court of Appeals for the District of Columbia under the third and fourth quoted paragraphs of § 3731, set forth on p. 2, *supra*.

An argument can be made, that as a matter of sound appellate policy, appeals involving the validity of District statutes should be taken in the first instance

to the Court of Appeals for the District of Columbia. Where the statutes are of local effect only, no issues of national policy are involved demanding the expeditious attention of this Court. Furthermore, this Court has on occasion deferred to decisions of the court of appeals based on interpretations of local District statutes or rules of law, see *Griffin* v. *United States*, 336 U.S. 704, 712–718, *District of Columbia* v. *Pace*, 320 U.S. 698, 702, *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285, although this deferment policy has yielded where statutory interpretation questions are "so enmeshed with constitutional issues that complete disposition by this Court is in order." *District of Columbia* v. *Little*, 339 U.S. 1, 4, fn. 1. See also *Kent* v. *United States*, 383 U.S. 541, 557, fn. 27.

Overriding these policy considerations, however, is the literal language of § 3731 which certainly on its face includes statutes limited in operation to the District of Columbia. In *United States* v. *Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U.S. 869, the Court of Appeals for the District of Columbia certified a case involving the validity of a local District statute to this Court for direct review under § 3731, although the possibility that the direct review provisions of § 3731 might not be applicable was not adverted to.

A construction of the Criminal Appeals Act which would bar the appeal in this case would lead to anomalous consequences, in view of the separate provision in that Act allowing for direct appeals to the Supreme Court from the pre-jeopardy granting of a motion in

bar. While this Court has disagreed over the precise meaning to be given the term "motion in bar" (see *United States* v. *Mersky*, 361 U.S. 431; Brief for the United States in *United States* v. *Sisson*, No. 305, this Term, p. 24, fn. 7), all members of the Court are in agreement that it includes such things as rulings with respect to a statute of limitations, the privilege against self-incrimination, or speedy trial. Thus it would appear that a decision in the United States District Court for the District of Columbia dismissing a prosecution under a local statute upon the granting of a motion that another local statute fixing the period of limitations had not been complied with would be appealable directly to this Court, while (under the hypothetical interpretation we oppose) a ruling dismissing the case because of the *invalidity* of the statute alleged to have been violated by the defendant would not. See *United States* v. *Sweet*, No. 577, this Term, Statement Respecting Jurisdiction pending, where the United States Court of Appeals for the District of Columbia certified a case to this Court involving a prosecution under a local statute because, in its view, the trial judge's ruling dismissing the case was a motion in bar under the Criminal Appeals Act. It is unlikely that Congress intended to distinguish in this way between the two classes of decisions described.

While this Court has not dealt directly with the applicability of the Criminal Appeals Act to statutes of local application only, it has ruled that a constitutional challenge to an act of Congress applicable only to the District of Columbia must be heard by a three-

judge court under 28 U.S.C. 2282, which provides that an action to enjoin the operation of an "Act of Congress" must be considered by such a court. *Shapiro* v. *Thompson,* 394 U.S. 618, 625, fn. 4. Before that decision there had been some doubt as to whether this was a necessary construction of Section 2282. In *Ex parte Cogdell,* 342 U.S. 163, this Court had raised a question as to whether the three-judge statute governed where the act under attack applied only in the District of Columbia. Presumably, it was thought that the situation might be analogous to decisions under 28 U.S.C. 2281, holding that local ordinances and the like were not "statutes" of a state so as to require a three-judge court when constitutionality was challenged in an enforcement action. See *Moody* v. *Flowers,* 387 U.S. 97, 101, and earlier decisions there cited.[3] In *Shapiro* v. *Thompson,* however, the Court resolved the issue saying (394 U.S. at p. 625, fn. 4):

> Section 2282 requires a three-judge court to hear a challenge to the constitutionality of *"any* Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.[4]

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[3] In construing its jurisdiction under 28 U.S.C. 1254(2), 1257(1) and 1257(2), which allow appeals from decisions involving the constitutionality of "State statute[s]", "statute[s] of the United States" and "statute[s] of any state," respectively, this Court has consistently given those terms broad scope. See Stern & Gressman, *Supreme Court Practice*, pp. 31–34, 80–87 (4th ed. 1969).

[4] In *Berman* v. *Parker*, 348 U.S. 26, the Court had considered the constitutionality of a District of Columbia statute in an appeal under 28 U.S.C. 1253 from a decision of a three-judge court.

There is no more basis for reading an exception into the Criminal Appeals Act. Indeed, the term "statute" used here is arguably more broadly inclusive than "Act of Congress." [5] At all events, many criminal statutes of the United States have only limited territorial applications. *E.g.*, 18 U.S.C. 1111 and 1112, punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"; 18 U.S.C. 1151–1160, dealing with Indian territory. So long as Congress legislates for the District of Columbia and prosecutions under the D.C. Code are brought by the United States in the District Court of the United States for the District of Columbia, we see no basis on which a decision of the district court dismissing an indictment predicated on the construction or invalidity of what is undoubtedly a "statute" can be deemed outside the scope of the Criminal Appeals Act.

Respectfully submitted.

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[5] Thus, the Criminal Appeals Act might authorize direct appeal to this Court of a judgment dismissing a criminal case for invalidity of a statute enacted by a local legislature if the prosecution were instituted by the United States in a United States district court. That procedure was not appropriate in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, because the prosecution in that case was initiated by the District government itself in its own municipal court.

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